83-206

CASE NUMBER ___

In the

Supreme Court of the United States

October Term 1982

Charles M. Miller ..... *Petitioner*

vs.

The United States ..... Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals for the Federal Circuit incorrectly ruled that (i) the navigational servitude of the United States extends to high, fast lands of the Petitioner above the ordinary high waterline of the Arkansas River and (ii) an Arkansas River improvement, the Morrilton Cut-off, constructed in 1950 is in the scope of a project for which the Corps of Engineers did the planning in the late 1950's, thereby making the Petitioner's property subject to a taking without any right to just compensation therefor.

PARTIES

The caption to this Petition shows all parties to the proceedings sought to be reviewed.

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REFERENCE TO OPINIONS OF LOWER COURTS

These are listed in chronological order:

(a) Opinion of the trial judge (Colaianni) of the Court of Claims filed June 14, 1978.

(b) Order of Court of Claims, *en banc*, entered November 21, 1979, remanding case to trial judge.

(c) Order of Court of Claims entered February 8, 1980.

(d) Judgment and Opinion of the United States Claims Court in Charles M. Miller vs. United States, Docket No. 66-75, decided October 19, 1982, and reported at 550 F.Supp. 669, 1 USCCR No. 12.

(e) Unpublished Opinion of the United States Court of Appeals for the Federal Circuit, decided May 11, 1983 in Appeal No. 83-368, Charles M. Miller vs. United States.

JURISDICTION

Review is sought by writ of certiorari under 28 U.S.C. §1254(1) of a judgment of the United States Court of Appeals for the Federal Circuit entered May 11, 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION, Amendment V:

> "[N]or shall private property be taken for public use, without just compensation."

28 U.S.C. §1491:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

Rivers and Harbors Act of July 24, 1946, Pub. L. No. 79-526, 60 Stat. 641:

> "The following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated:

. . .

> Arkansas River and tributaries, Arkansas and Oklahoma: The multiple-purpose plan recommended in the report of the Chief of Engineers dated September 20, 1945, and letter of the Chief of Engineers dated March 19, 1946, is approved, and for initiation and partial accomplishment of said plan there is hereby authorized to be appropriated the sum of $55,000,000; . . ."

Civil Functions Appropriation Act of 1950, Pub. L. No. 81-355, 63 Stat. 845:

> "The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending June 30, 1950, for civil functions administered by the Department of the Army and for other purposes, namely:
>
> . . .
>
> Emergency fund for flood control on tributaries of Mississippi River: For rescue work and for repair or maintenance of any flood-control work on any tributaries of the Mississippi River threatened or destroyed by flood, in acordance with section 9 of the Flood Control Act, approved June 15, 1936 (49 Stat. 1508), $500,000 . . . ."

Flood Control Act of June 15, 1936, Pub.L. No. 74-678, 49 Stat. 1508:

> "The sum of $15,000,000 is authorized to be appropriated as an emergency fund to be allocated by the Secretary of War [Secretary of Army] on the recommendation of the Chief of Engineers in rescue work or in the repair or maintenance of any flood-control work on any tributary of the Mississippi River threatened or destroyed by flood heretofore or hereafter occurring: . . . and also in the construction, repair, or maintenance, and in the reimbursement of

levee districts or others for the construction, repair, or maintenance of any flood-control work on any of the tributaries or outlets of the Mississippi River that may have been impaired, damaged, or destroyed by caving banks or that may be threatened or impaired by caving banks, or such tributaries, whether or not such caving has taken place during a flood stage: Provided further, That if the Chief of Engineers finds that it has been or will be necessary or advisable to change the location of any such section, such change may be approved and authorized."

CONCISE STATEMENT OF THE CASE

Procedure. In 1975, the Petitioner, Charles M. Miller, filed a Complaint in the Court of Claims under 28 U.S.C. §1491 alleging that his farm, which is riparian to the Arkansas River, had received additional flooding as a result of the Corps of Engineers placing into operation Lock and Dam No. 8 (Toad Suck Ferry) in November, 1969. The trial court ordered a bifurcated proceeding and the case went to trial in October, 1977, on liability only. The trial judge in June, 1978, filed a recommended decision and conclusions of law determining that there had been a taking from the Petitioner's property for which compensation would be owed. The United States sought review of those recommendations in the Court of Claims, which, by a decision *en banc*, entered an order on November 21, 1979, remanding the case to the trial judge for a determination of certain specified factual issues. A hearing was had before the trial judge in August, 1981, on the remanded points. On October 1, 1982, the Act of April 2, 1982, Pub.L. No. 97-164, 96 Stat. 27, became effective whereby the Court of Claims trial judges became equivalent to United States district judges whose decisions would then be reviewed by the newly created United States Court of Appeals for the Federal Circuit. The newly-empowered trial judge then rendered a decision on October 19, 1982, ruling that the Government's navigational servitude insulated it from liability to the Petitioner for the taking of his property. The Petitioner appealed that ruling to the United States Court of Appeals for the Federal Circuit which on May 11, 1983, sustained the trial judge's decision. The Petitioner now seeks review by a writ of certiorari.

Facts. In chronological sequence the substantive facts from which are derived the issues in this case are as follows:

- In 1936, the Petitioner acquired a farm of approximately 1,834 acres south of and riparian to the Arkansas River in Conway County, Arkansas. In Conway County, the

River generally flows from west to east, however the bulk of the Petitioner's farm was located in a looping bend of the River and in effect formed a peninsula jutting north. In ensuing years the peninsula migrated to the east with erosion on the west side and accretion on the east. By 1950, erosion had reduced the property to approximately 1,000 acres.

- In 1946, Congress enacted the Rivers and Harbors Act of July 24, 1946, Pub.L. No. 79-526, 60 Stat. 641, which authorized a multiple-purpose project on the Arkansas River.

- In the Civil Functions Appropriation Act of 1950, Pub.L. No. 81-355, 63 Stat. 845, funds were appropriated for the Morrilton Cut-off, however, without reference to the multiple-purpose project authorized by the Rivers and Harbors Act of July 24, 1946.

- In 1950, the Corps of Engineers began construction of the Morrilton Cut-off. In that construction, the peninsula which constituted the bulk of the Petitioner's farm was lopped off at the base by a new channel which eliminated the looping bend in the River. Part of the Petitioner's property was left south of the new channel and the bulk of the property, the former peninsula, was to the north of the new channel but as an island surrounded on the other three sides by the old river channel. The Corps acquired 248 acres of the Petitioner's property for the Cut-off.

- Over the next several years the old channel to the north of the Petitioner's property largely filled in and became high, fast land. In 1962 the Petitioner obtained an Emerged Land Deed from the State of Arkansas to approximaely 800 acres pursuant to *Ark. Stat. Ann.* §10-204, *et seq.*

- In 1956, the Corps of Engineers began construction of the Arkansas River Navigation System (now McClellan-Kerr Arkansas River Navigation System).

- In the 1960s, the Corps constructed Lock and Dam No. 8 (Toad Suck Ferry) approximately 9½ river miles downstream from the Petitioner's property. For that project the Corps acquired a crescent-shaped sliver of land along the east, northeast part of the property which the Petitioner had acquired from the State of Arkansas, 17 acres in extent, between elevation 265-268 m.s.l.

- In November 1969, the Corps placed Lock and Dam No. 8 in operation, closed the gates and established a pool behind the dam to an elevation of 265 m.s.l.

- By 1974, it became apparent to the Petitioner that his property was flooding longer than before Lock and Dam No. 8 was placed in operation and therefore he filed suit under 28 U.S.C. §1491, *supra*.

Basis for Federal Jurisdiction. The basis for federal jurisdiction in the Court of Claims in the first instance was 28 U.S.C. §1491.

ARGUMENT

THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT INCORRECTLY RULES THAT (i) THE NAVIGATIONAL SERVITUDE OF THE UNITED STATES EXTENDS TO HIGH, FAST LANDS OF THE PETITIONER ABOVE THE ORDINARY HIGH WATERLINE OF THE ARKANSAS RIVER AND (ii) AN ARKANSAS RIVER IMPROVEMENT, THE MORRILTON CUT-OFF, CONSTRUCTED IN 1950 IS IN THE SCOPE OF A PROJECT FOR WHICH THE CORPS OF ENGINEERS DID THE PLANNING IN THE LATE 1950s, THEREBY MAKING THE PETITIONER'S PROPERTY SUBJECT TO A TAKING WITHOUT ANY RIGHT TO JUST COMPENSATION THEREFOR.

The ruling by the court of appeals for which review is sought is not only wrong but has two significantly adverse impacts upon the prior state of the law. It has effectively raised title questions to tens of thousands, perhaps millions, of acres of land riparian to the various navigable rivers of the United States. It has also determined contrary to prior Supreme Court rulings that the navigational servitude extends to high, fast lands above the ordinary high waterline of a navigable river.

In *Oklahoma Ex Rel Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 516, et seq. (1940), there is a good history of Government flood control and navigation efforts on the Mississippi River System, up to 1940. In summary, there have been Congressional plans for navigation and flood control on the Mississippi River System, including the Arkansas, at least since 1852, including specifically the Flood Control Act of May 15, 1928, Pub.L. 70-391, 45 Stat. 534, and the Flood Control Act of 1936, Pub.L. 74-738, 49 Stat. 1570, and for the Arkansas, an authorization for a multiple-purpose project contained in the Rivers and Harbors Act, of July 24, 1946, Pub.L. No. 79-526, 60 Stat. 641.

If, as is ruled in the decision from which this appeal is taken, a Congressional authorization for a plan of river improvement creates a "project" such that accretional deposits, or avulsive changes, do not thereafter vest title in the riparian owners along the river for which Congress has established the plan, for all practical purposes landowners have lost most of their riparian rights. Even if the decision is somewhat more limited and only comes into play where the Corps of Engineers has built dikes, revetments, done bank stabilization work, or whatever, one suggests that nonetheless the bulk of the riparian property along navigable rivers in the United States is affected by the decision because the Corps of Engineers has continuously through the years tinkered with the rivers, here a dike, there a revetment, cut-off, rechannelization, etc. See, e.g., the Flood Control Act of 1936, *supra*, which lists dozens of specific projects authorized to be built. An example of the application of the new rule is that in a number of other cases filed by the Petitioner's attorneys against the United States pursuant to 28 U.S.C. §1491, both in Lock and Dam No. 8 and Lock and Dam No. 13, the Government is in essence claiming that any accretion deposited after 1946, or perhaps 1949, is subject to the navigational servitude, the Government can flood the property, and the landowners damages are *damnum absque injuria*.

The ruling appealed from has also applied the government's navigational servitude to high, fast land above the ordinary high waterline of the River with unknowable effects on the correlative rights and interests of the United States, the states and private landowners.

It is clear from *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950) that the navigational servitude extends only to property located between the ordinary high waterline on one bank of the river and the ordinary high waterline on the other bank, is bounded by the ordinary high waterlines, and does not extend to high, fast lands

located beyond those lines.[1] In extending the navigational servitude to land located beyond the river bank, the lower court has largely based its decision on *dicta* in *Bonelli Cattle Co. v. Arizona*, 414 US. 313 (1973).[2] *Bonelli* is concerned with title, not damages, and the issue in the case is whether federal or state law determines the vesting of title to accretion and avulsive changes.

The ruling of *Bonelli* is that federal law governs and that dry land, thrown up by rechannelization of a navigable river, belongs to the riparian owner and not to the State of Arizona. In reaching that decision, the court thoroughly discusses the Equal Footing Doctrine, evulsion, accretion, and related matters and then renders the ruling off the case but with a condition, as follows:

> " . . . Accordingly, where land cast up in the Federal Government's exercise of the servitude is not related to furthering the navigational or related public interest, the accretion doctrine should provide a disposition of the land as between the riparian owner and the State . . . ." 414 U.S. at p. 329.

The opinion continues:

> "Similarly, riparian lands may suffer noncompensable losses or be deprived of their riparian character altogether by the State or Federal Government in the exercise of the navigational servitude. *In compensation for such losses, land surfaced in the course of such governmental activity should inure to the riparian*

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[1]There are cases, see e.g., *United States v. Twin City Power Co.*, 350 U.S. 222 (1955), which in a fashion extend the navigational servitude to *property rights*, not surface land ownership, which exist outside the banks of a river: a landowner may not recover an increment of value to his property which derives from the flow of the stream.

[2]*Bonelli* is reversed by *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) which holds that state, not federal, common law governs these land title questions.

owner where not necessary for the navigational project or its purpose . . . ." 414 U.S. at p. 329 (emphasis added)

The court offers no examples and cites no cases as exemplars of the operation of the condition to the vesting of title, that the land not be needed for the project or its purpose. The decision in the present case is that dry land deposited as a result of the Morrilton Cut-off is "necessary to the navigational project or its purpose" because the Government flooded that land as part of the overall river navigation project, thus needing that property for "its purpose." Consequently the effect of the decision is that any land which may be deposited as accretion, or suffer an evulsive change, after a project is conceived of by Congress and where the Government has performed any river improvements affecting the flow of the river in the area, is needed for the project and thus title to that property does not vest in the riparian owner. If the land is flooded, it is needed for the project and thus the Government is immunized from paying just compensation for a taking. One doubts that is the intention of the *Bonelli* language quoted above. Rather, the type of fact situation intended to be addressed is where, for example, the Government constructs a coffer dam or new channel, to dry up a portion of the riverbed in order to construct under dry conditions a dam or other river improvement. Under those circumstances the *title* to the surfaced land should not vest in the riparian owner. But the extension of that concept to cases where the land is not thrown up by the specific construction activity for which the land is needed and where the purpose for which it is needed is to flood it, is to bring chaos to previously clear legal relationships.

Doubtlessly the court of appeals was concerned that the Petitioner is getting something for nothing at the expense of his Government. But there is a long-standing legal doctrine to protect the Government from excessive payments of just compensation as expounded in *United States v. Miller*, 317 U.S. 369 (1943) and its progeny. The

procrustean wielding of *Bonelli* not only causes legal chaos, but is totally unnecessary.

The *Miller* doctrine is that a landowner whose property is taken for a project cannot be paid as part of his just compensation the value of benefits that the property has received because known to be in the scope of the project. Application of the *Miller* doctrine has the further advantage that the concept of the "scope of the project" which is the desideratum for barring or allowing benefits to the landowner is one which is thoroughly discussed in *Miller* and other cases following it. Finally, *Miller* addresses damages (just compensation) and not vesting of title. The practical problem with making the issue one of title vesting is that it leaves title to vast areas of property in limbo, both tracts which will be affected by the project and tracts which will not, from the time that a project is authorized by Congress until the project has been fully completed. For the Arkansas River, that time span was at least from 1946 when the navigation project was authorized, until 1969 when the bulk of the project was placed in operation. There is no necessity for placing in question such vast areas of riparian property for periods of decades. *Miller* on the other hand, is a specific for the disease being treated. It protects the Government from paying to a landowner benefits conferred upon the landowner by the Government. As the Court well recognizes in *Bonelli* "[t]here are a number of interrelated reasons for the application of the doctrine of accretion, etc." 414 U.S. at p. 539. One of the primary reasons there stated is the "compensation theory": because riparian land is at the mercy of the wanderings of the river and a riparian owner is subject to losing land by erosion beyond his control, he should receive the benefits from any additions to his lands by the accretions thereto which are equally beyond his control. But under *Bonelli* as applied by the court of appeals under circumstances which will frequently recur, the landowner is subjected to losing his property by erosion with no offsetting right to ownership of accretion as compensation therefor.

We submit that appropriate application of the *Miller* doctrine to the facts of the present case would not insulate the Government from paying compensation to the Petitioner. The specific issue is:

> "The question then is whether the [petitioner's] lands were probably within the scope of the project from the time the Government was committed to it . . . ." 317 U.S. at p. 377.

In the present case, although the Government has been committed to the project at least since 1946, until the plans for the navigation project could be completed, in the late 1950s, with a determination of the location of specific dams and other river improvements, none of the property along the river was "probably within the scope of the project," unless one would apply that concept as meaning, under the circumstances, that all property along the river is in the probable scope of the project. Surely by that terminology it is meant that there must be some consideration by which one can determine property which probably will be affected and separate that from property which probably will not be affected. Nothing of that kind existed before the late 1950s. The trial court specifically found:

> " . . . The [navigation] plan was changed many times as the Corps found ways of simplifying the system. In 1960 or shortly thereafter, it was decided that the Toad Suck Ferry Lock and Dam No. 8 would be located 9½ miles downstream from plaintiff's property, and that the elevation of its upstream navigation pool would be fixed at 265 feet . . . ." Opinion of June 14, 1978 at p. 4.

Further, in applying the *Miller* doctrine, one must be cognizant of its purpose which is to avoid the Government recompensing a landowner for increases in the fair market value of his property resulting from the location of the governmental project. It is clear in the present case that the

benefit, and consequent increase in fair market value, of the Petitioner's property prior to 1969 is not derived from the navigational project but from accretions subsequent to the construction of the Morrilton Cut-off. The appropriation for the Morrilton Cut-off is contained in the Civil Functions Appropriation Act of 1950, *supra*, which relates the appropriation not to the 1946 Act which authorized the navigation project, Rivers and Harbors Act of July 24, 1946, *supra*, but instead to an Act of June 15, 1936, Pub.L. No. 74-678, *supra*.

CONCLUSION

The lower court decisions in this case are an instance of "throwing out the baby with the bathwater." This Court should grant certiorari in order to correct these erroneous decisions which otherwise will be *stare decisis* (i) for the proposition that the Government's navigational servitude extends to fast lands above the ordinary high water mark of navigable rivers: thereby reversing decades of effort, culminating in *United States v. Kansas City Ins. Co., supra*, by this Court to define the servitude; and (ii) placing in limbo an unknown number of land titles held by riparian landowners. Neither result is necessary: there are entirely adequate precedents, the *Miller* case and its progeny, to apply to the determination of the type of issue presented by this controversy.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CHARLES M. MILLER,	Appeal No. 83-568.
Appellant,	
v.	
THE UNITED STATES,	
Appellee.	

Decided: May 11, 1983

Before MARKEY, *Chief Judge*, DAVIS and BALDWIN, *Circuit Judges*. BALDWIN, *Circuit Judge*.

DECISION

The judgment of the United States Claims Court (trial court), dismissing appellant's petition alleging a compensable taking under the fifth amendment, is *affirmed*.

OPINION

We agree with the trial court's conclusion that the government's navigational servitude extends fully to emerged lands within the former riverbed of a channel converted to a nonnavigable tributary by exercise of the government's perogative to improve navigation. *See, e.g., Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82, 87 (1913). *See also United States v. Grand River Dam Authority*, 363 U.S. 229, 232-33 (1960) (federal control of a navigable stream extends to a nonnavigable tributary). As appellee correctly stated, appellant's title, derived from Arkansas under state law, was subject to a servitude in favor of the government. Accordingly,

no liability can arise from the 1969 reinundation, admittedly the result of a navigational improvement on the Arkansas River, by virtue of the government's servitude. *See Coastal Petroleum Co. v. United States*, 524 F.2d 1206, 1109-10 (Ct. Cl. 1975), and cases cited therein.

Appellant's attempt to apply the holdings of *Miller v. United States*, 317 U.S. 369 (1943), to the present case is without merit. We can find no basis in the record for questioning the trial court's conclusion that the flooding of appellant's land in 1969 was necessary to the same navigation project which caused the initial emergence of the land. At the very least, appellant has failed to demonstrate two takings, separated by a period of time, as a prerequisite to using a "scope of the project" analysis in accordance with *Miller*. *See City of Van Buren, Arkansas v. United States*, 697 F.2d 1058, 1061 (Fed. Cir. 1983).

IN THE UNITED STATES COURT OF CLAIMS

TRIAL DIVISION

No. 66-75

(Filed June 14, 1978)

CHARLES M. MILLER	)	
	)	Taking; Easement;
v.	)	Flood Control; Surface
	)	Water; Ground Water
THE UNITED STATES	)	

W. Dent Gitchel, attorney of record, for plaintiff. *Cearley, Gitchel, Bogard and Mitchell, Gordon and Gordon, H. Clay Robinson*, and *Pearce, Robinson & McCord*, of counsel.

John E. Lindskold, with whom was *Assistant Attorney General James W. Moorman*, for defendant.

OPINION*

COLAIANNI, *Trial Judge:* This case, brought pursuant to 28 U.S.C. §1491, involves an alleged inverse "taking" by the Government of flowage and underflowage easements over farmland located riparian to the Arkansas River. Plaintiff claims that the operation of the McClellan-Kerr Arkansas River Navigation System (hereinafter the "Project") has resulted in increased duration of flooding on part of his property, and in the raising of the ground water table thereunder to such an extent that he cannot tractor farm crops, such as soybeans and alfalfa, thereon. The parties' joint motion under Rule 131(c) for a separate trial and determination of liability was allowed, so only that issue is herein addressed. For reasons which follow, it is concluded that defendant's actions resulted in a "taking" for which, under the Fifth Amendment, plaintiff is entitled to "just" compensation.

Background Facts

Plaintiff, in 1936, became the owner of a 1,834-acre tract of land in Perry County, Arkansas. This tract (hereinafter, the "Property") was at one time located within a northward loop of the Arkansas River.

The Arkansas River was highly unstable in its natural state. Because of its heavy sediment load, it presented serious impediments to navigation. The river could overnight change from a mere trickle of water to a rushing torrent, change its course, and destroy improvements along its banks.

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*The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

During the late forties, erosion transformed plaintiff's property into a peninsula delimited by a "horseshoe" band of the Arkansas, and reduced his acreage to between one-third and one-half of its original size. The Corps of Engineers (hereinafter the "Corps") became concerned, as they expected that the river would soon cut itself a new channel across the neck of the peninsula. Such a natural "avulsive change" would have been a serious setback to river navigation, as the new channel would probably contain sharp, difficult-to-navigate bends. The United States therefore acquired 248 acres from plaintiff for $34,000 and planned the construction on this acreage of a new, easily navigable channel for the river (hereinafter the "Morrilton Cutoff" or "Cutoff").

In May 1950 the Corps constructed a pilot channel across the neck of the ox bow. The abrasive action of the river soon widened the channel to the desired extent, and its northern bank was stabilized by the Corps in 1952 by the construction of a suitable revetment.

The new channel captured most of the flows of the Arkansas. As a result of water flowing through the old channel at lesser velocities, sediment was deposited. The silting-up of the ox bow was accelerated by the Corps' construction of two dikes at the upstream end of the old channel in 1952 to divert flows away from the old river bed. The old channel became an ox bow lake, a nonnavigable tributary of the Arkansas. Eventually the plaintiff sought and obtained title to the emerged lands, and began to farm them. Of the 1,719 acres currently comprising the Miller farm or Property, approximately 800 acres lie on the pre-Cutoff bed of the Arkansas River.

In 1956 the Corps began the construction of the Project, authorized by Congress back in 1946.[1] Seven tributary lakes were to be converted into multiple-purpose

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[1]Rivers and Harbors Act of July 24, 1946, 60 Stat. 641.

reservoirs for low-flow regulation, sediment control, flood control, domestic and industrial water supply, and hydroelectric power. In addition, the main stem of the river was to be "canalized" by 17 navigation locks and dams. (When completed, the Project was to provide a 448-mile long navigational channel from around Tulsa, Oklahoma, to the Mississippi River.) By 1964 the last of the upstream flood control reservoirs had been readied for flood control operation, the primary object of the authorizing legislation. The canalization plan was changed many times as the Corps found ways of simplifying the system. In 1960 or shortly thereafter it was decided that the Toad Suck Ferry Lock and Dam No. 8 would be located 9½ miles downstream from plaintiff's Property, and that the elevation of its upstream navigation pool would be fixed at 265 ft. The Property is riparian to this pool. In 1965 wing dikes were constructed downstream of the Property, and in 1969 the downstream Dam No. 8 was closed.

Since then, the Property—which had always been subject to overflows—has allegedly suffered from increased frequency and duration of flooding at certain elevations. Plaintiff attributes this increased flooding to the backwater effect of the downstream structures and the prolonged releases of water from the flood control reservoirs after the passage of major storms. Plaintiff similarly alleges that the water table underlying the Property has been raised—in excess of Government projections—by the Project, to the detriment of his farm. Plaintiff demands compensation for the alleged "takings."

Defendant would dispose of plaintiff's "taking" arguments at the threshhold by a finding that the lands affected were formerly a part of the river bed of the Arkansas and therefore subject to the navigational

servitude of the United States.[2] Defendant's contention is unpersuasive and must be rejected.

It is admitted by defendant that title to the bed of the Arkansas, which vested in the State of Arkansas by virtue of the "equal footing" doctrine, revested in plaintiff after rechannelization of the river. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977); Ark. Stat. Ann. §10-204, *et seq.* But defendant insists that it retains a navigational servitude over the abandoned bed under the doctrine of avulsion.

Navigational servitudes, both federal and state, exist because of the paramountcy of the public interest in riparian commerce.[3] *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 804-06 (1950); *United States v. Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596-97 (1941). The federal and state governments may do whatever they deem advisable to further the interests of navigation without becoming obligated to compensate for harm caused to lands situated below the normal high-water mark. *Id.*

The normal high-water mark of the Arkansas River in the vicinity of the Property is 265 ft.[4] It is the contention of the plaintiff that the construction of the Project has caused compensable damage to portions of the Property lying above 268 ft.[5] According to the Supreme Court, "[h]igh-water mark bounds the bed of the river. Lands above it are

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[2]This court must, of course, also evaluate the effects of the Project on at least those lands that remain from plaintiff's original 1936 purchase. In addition, defendant has not shown how this argument would dispose of plaintiff's claim for compensation for the alleged ground water damage.

[3]*See* Commerce Clause, U.S. Const., art. I, §8, cl. 3.

[4]All altitude references are with respect to mean sea level (MSL).

[5]The United States acquired by condemnation a flowage easement over the lands lying between 265 and 268 ft.

fast lands and to flood them is a taking for which compensation must be paid." *United States v. Willow River Power Co.*, 324 U.S. 499, 509 (1945). If, then, plaintiff's factual contentions are correct, it would seem that he is entitled to compensation.

Defendant contends that the land within the old ox bow, when under navigable water, is subject to the navigational servitude of the United States; that the Morrilton Cutoff was an "artificial avulsion"; that under Arkansas and federal law an "artificial avulsion" does not disturb property rights and interests; and that the land, though no longer the bed of a navigable waterway, is still subject to the federal navigational servitude. Defendant's position is erroneous.

Since time out of mind, rivers have been used to mark the boundaries between estates, counties, provinces, and nations. This custom has both advantages and disadvantages. The chief disadvantage is that river channels are not static. Some rivers "migrate" a good deal. The Arkansas River is a case in point. In the last 150 years the Arkansas has migrated completely across what is now the Miller property, and the scars of former river channels can be seen miles from the present location of the river.

This natural phenomenon has been a continuing source of litigation as to riparian rights. Again and again the common law courts have had to resolve boundary disputes between abutting riparian landowners. Certain rules relating to "accretion" and "avulsion" evolved which have withstood the test of time.

When the banks of a "boundary" stream "are changed by the gradual and imperceptible process of accretion or erosion," the stream remains the boundary line. "But when [the stream] suddenly and perceptibly abandons its old channel [*i.e.*, suffers an "avulsion"], * * * the boundary remains at the former line." *Philadelphia Co. v. Stimson*, 223 U.S. 605, 624 (1912).

In *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 325-26 (1973), a case involving a federal rechanneling of the Colorado River, the rationales for the common law doctrines were explained.[6] The doctrine of accretion recognized that the "quality of being riparian, especially to navigable water, m[ight] be a property's most valuable feature," while the doctrine of avulsion "mitigate[d] the hardship that a shift in title caused by a sudden movement of a river would cause the abutting landowners were the accretion principle * * * applied."

The Federal Government is not the "owner" of the bed of the Arkansas. It is merely the holder of a navigational servitude thereover. The existence of this servitude is obviously dependent on whether the Arkansas remains an artery of interstate commerce. If it permanently dried up to the point of nonnavigability, the navigational servitude would likewise evaporate.

Defenadant, relying upon the doctrine of avulsion, argues that the rechanneling of the Arkansas did not automatically divest existing interests over the old river bed. Thus, defendant contends that title to the old river bed and the navigational easement remained respectively with the State of Arkansas and the United States. Defendant's argument is unsupported by both legal precedent and logic. No cases have been cited by defendant, and a review of relevant precedent fails to disclose a single case that would continue the United States' navigational easement over nonnavigable waterways.

Moreover, defendant's argument for the application of the avulsion doctrine to a federal navigational servitude is

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[6]While the Supreme Court has refused to impose its interpretation of these doctrines (i.e., a federal common law) on the state courts, *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), nevertheless the historical analysis contained in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), is deserving of respect.

logically unpersuasive. As set forth in *United States v. Chicago, M., St. P. & R. Co.*, *supra*, at 595-96, the intent of Congress to regulate commerce explains the creation of the servitude in the first instance:

> Commerce, the regulation of which between the states is committed by the Constitution to Congress, includes navigation. 'The power to regulate commmerce comprehends the control for that purpose, and to the extent necessary, of all the *navigable* waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." [Citation omitted and emphasis added.]

Defendant has not shown how this constitutional intent would be furthered by the continuation of its navigational easement over a nonnavigable river bed. Defendant's interest in navigation is best served by holding, in situations such as this, that its navigational easement follows the navigable stream.

Defendant has also made an appeal for "fairness and equity":

> [T]he United States intentionally created lands in the bed of the river in the course of constructing a navigation project. To make the United States acquire a flowage easement over the same lands in order to operate the same project does not comport * * * [with the notion of "just" compensation].

But defendant would have us give the United States a windfall, an easement over many acres of dry land. Defendant in effect wants a servitude over the present, as well as a former bed of the Arkansas River. If given such a servitude, defendant could then logically demand a servitude over all the former beds of the river *i.e.*, over the entire flood plain of the Arkansas, and the Federal

Government would be able to flood any stretch with impunity. Indeed, the evidence of record demonstrates that the Arkansas has at one time or another meandered over virtually the entire expanse of plaintiff's property. Thus, to grant defendant's appeal would in substance be holding that the defendant has a right to flood all of plaintiff's property with impunity. This is the *reductio ad absurdum* of defendant's position. It is the need for fairness and equity that requires that defendant be denied the windfall it seeks.

Nor does this resolution result in a windfall to plaintiffs.

> [R]iparian lands may suffer noncompensable losses or be deprived of their riparian character altogether by the State or Federal Government in the exercise of the navigational servitude. In compensation for such losses, lands surfaced in the course of such governmental activity should inure to the riparian owner where not necessary to the navigational project or its purpose [*Bonelli Cattle Co. v. Arizona*, *supra*, 414 U.S. at 329.] Every proprietor whose land is * * * bounded [by a navigable stream] is subject to loss by the same means which may add to his territory: and as he is without remedy for his loss in this way, he cannot be held accountable for his gain. [*New Orleans v. United States*, 12 U.S. (10 Pet.) 292, 298 (1836).]

When an avulsion occurs, the private boundary lines are not shifted, but the navigational servitude is. The navigational servitude follows the perambulations of the Arkansas River.

> Its bed may vary and its banks may change, but the Federal power remains paramount over the stream, * * *. The public right of navigation follows the stream * * * and the authority of Congress goes with it. [*Philadelphia Co. v. Stimson*, 223 U.S. 605, 634-35 (1912).]

Flood Control: Background Facts

In the 1940's, when the Arkansas River was still in its natural state, a heavy rainfall would swell it into a raging torrent, causing it to overflow its banks and inflict heavy losses to both shipping and riparian property. When the rainfall subsided, the flood waters quickly receded. If the elevation of the river surface were plotted as a function of time, a flood would be graphed as a tall, slender peak. Flood regulation shortens and broadens these peaks.

Flood regulation is accomplished by temporarily detaining potential flood waters in flood control reservoirs. There are seven flood control reservoirs in the Project. (All are upstream of the Property.) Flood regulation began in the 1963-65 period.

Flood water detention "knocks the crest off" the flood, and thereby protects higher-lying lands from inundation. But this protection comes at the expense of the lower-lying lands, which will remain inundated for longer periods. The capacity of flood control reservoirs is finite, and the retained waters must eventually be released. The sooner they are released, the sooner the reservoirs are ready to cope with the next rainfall. But a quick release will retard the ebbing of the flood waters, and thereby have a deleterious effect on lower-lying riparian lands. On the other hand, a slower discharge rate that results in flows of the Arkansas River of 80,000 CFS,[7] or higher, presents other problems since it will draw out the reservoir reemptying process and prevent navigation on the Arkansas for a longer period of time.[8] A necessary consequence of flood control is that some lands may be flooded more frequently, rather than less.

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[7]"CFS" is cubic feet per second.

[8]Navigation on the Arkansas is not possible at flows of 80,000 CFS or higher.

The Project has furthered navigation on the Arkansas by, *inter alia*, constructing 17 navigation locks and dams. The Toad Suck Ferry Lock and Dam (No. 8), completed in November 1969, is 8½-miles downstream from the Property.

Plaintiff's First Taking Theory: Flowage Easement

Plaintiff's first allegation is that the backwater effect of the Toad Suck Ferry Lock and Dam (No. 8)[9] and various revetments and wing dikes, in conjunction with the flood control operations of the upstream reservoirs, has resulted in increased flooding of the lower-lying portions of the Property.

A "taking" may be bottomed on governmental action resulting in increased duration or frequency of flooding.

> Where property on a river is subject to intermittent overflows in its natural state and the construction of a down-river dam makes it more subject to overflows than before, the difference is merely one of degree for purposes of compensation. [*King v. United States*, 192 Ct.Cl. 548, 552, 427 F.2d 767 (Ct.Cl. 1970) ("taking" established).]

The propensity of the Property to flooding is a function of the rainfall pattern over the Arkansas River watershed, the local hydrology, and the flood control regulation plan. In determining whether a "taking" has occurred, the propensity of the Property to *future* flooding is what must be ascertained. To the extent that the aforementioned factors will retain their present values, historical data is

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[9]The Government's present flowage easement between 265 and 268 ft. is keyed to the continued operation and maintenance of this dam. By taking this easement, the Government implicitly admitted that it expected the dam to have a deleterious and compensable effect on the Miller lands. Plaintiff's allegation is really that this effect was more pervasive than the Government had expected.

useful to the resolution of the flooding propensity question. One way of expressing this data is a "rating curve." A rating curve[10] reflects only the effect of "the lay of the land" on the vulnerability of the land to floods. If the post-Project rating curve were higher than the pre-Project rating curve, this would suggest that a taking had occurred."

Plaintiff's pre-Project and post-Project rating curves are based on river surface profiles[12] of major floods obtained over the years 1957-68 and 1970-73, respectively. Defendant's pre-Project rating curve is based on a 1940 river survey, and its post-Project rating curve is based on profiles taken during the years 1957, 1967 and 1970.

Plaintiff's and defendant's pre-Project rating curves are significantly different, and this difference is attributable to the Morrilton Cutoff. The Cutoff shortened the river by several miles and thereby lowered the rating curve of the river. Defendant insists that this benefit to the

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[10]A "rating curve" is a graphical representation of the relationship between the volume of water flowing past a mile-post in unit time (in cubic feet per second) and the elevation of the water surface. Elevations are plotted along the ordinate, and flows along the abscissa. Elevations, when referred to an arbitrary zero, are called "stages," and the flows are sometimes called "discharges."

[11]Further complicating the analysis is the lack of river data at the Property. The National Weather Bureau's Morrilton gauge, upstream of the Property, is the nearest source of stage information. The United States Geological Service's gauges at Dardanelle and Van Buren, both upstream of the Property, and at Little Rockk, downstream, record the average daily discharges at those locations. Therefore, it is necessary to interpolate and adjust this data in order to discover the flows and stages experienced at the Property.

[12]A "river surface profile" is a graphical representation of the relationship, at a particular time (such as immediately after a flood), between the elevation of the river surface (in feet above mean sea level, "MSL") at various points in its course (mileposts) and the distance of the mileposts from a reference point (the confluence, in 1940, of the Arkansas and Mississippi Rivers). Elevations are plotted along the ordinate and mileposts along the abscissa.

Property must be taken into account. Plaintiff claims that it has already been taken into account, either in the bargaining that occurred during the negotiation of the 1950 sale, or as an element in fixing just compenstion for acreage condemned in 1969. Defendant's surface water expert, Mr. Henson, testified that the benefits of the Cutoff to the Property would have been obvious to a hydrologist even in 1949.

Curiously, plaintiff and defendant both rely on *United States v. 62.17 Acres of Land, Etc., in Jasper County*, 538 F.2d 670 (5th Cir. 1976). This case involved, as the court put it, "a second taking from a single tract." The landowner first sold 1,800 acres to the Government, in furtherance of the construction of the Sam Rayburn Dam and Reservoir. Later the Government sought to obtain 62 acres by condemnation, again in furtherance of the Rayburn project. The landowner admittedly had benefited from the proximity of the project. It was held, 538 F.2d at 676, that there was a *rebuttable presumption* that these benefits were considered in the context of the negotiated sale (*see* 33 U.S.C. §596), and that:

> The Government thus must bear the burden * * * of demonstrating that anything less than what was then the present value of the enhancement which would accrue to the remainder was actually offset * * *. [538 F.2d at 677].

The Government has not met this burden.

But even if the Government could rebut the presumption arising from the 1950 sale, it is not permitted to rebut the presumption arising from the 1970 condemnation. Title 33 U.S.C. §595 (1970) directed the district court which adjudicated the Miller (265 to 268 ft.) flowage easement condemnation proceeding to "take into consideration by way of reducing the amount of compensation or damages any special or direct benefits to the remainder arising from" the construction of the

Morrilton Cutoff. It cannot be doubted that this mandate was obeyed in *United States v. 28.00 Acres of Land*, Civ. No. LR-69-C-118 (E.D. Ark., W.D., May 7, 1970), wherein compenstion was fixed for said flowage easement. Negotiated sales and condemnation proceedings are not legally equivalent: the latter give rise to an *irrebuttable* presumption of full offset. *See Jasper County*, at 676. This is a logical conclusion from the mandatory language of 33 U.S.C. §595.

Defendant correctly points out that deciding whether or not a taking has occurred involves "comparing physical facts relating to regulated and unregulated conditions." But this observation is not very helpful in determining which unregulated state, pre-Cutoff or post-Cutoff, is the proper starting point. If the benefits to plaintiff which accrued when the Morrilton Cutoff was constructed have already been weighed in the scales of justice, they should not be weighed again. It is therefore concluded that recovery should be based only on data reflecting the post-Cutoff state of the river, whether pre-Project or post-Project. Only plaintiff has presented a complete set of comparative post-Cutoff rating curves.

A "taking" can also be shown by a shift of the "stage-frequency" curve for the property.[13] According to defendant, an increase in frequency of flooding occurred only at elevations 266.5[14] and below, well within defendant's existing easement. According to plaintiff, flooding was increased at elevations at least as high as 272 ft. Plaintiff attributed this alleged adverse phenomenon to the Project, and specifically to the operation of the flood control reservoirs.

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[13]A stage-frequency curve indicates the number of days each year that a river surface will reach a given stage.

[14]Defendant's curves also show an apparent increase in flooding frequency between 273.5 and 276.5 ft.

It is not necessary, of course, that some portion of the Property be continuously flooded for the effect of the Project to be deemed a "taking."[15] *United States v. Cress*, 243 U.S. 316, 328 (1917):

> There is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other.

One corollary to the *Cress* rule is that a single flood does not constitute a "taking." *Hartwig v. United States*, 202 Ct.Cl. 801, 809 (1973). Indeed, if flooding is infrequent, even three floods do not constitute a "taking." *North Counties Hydro-Electric Co. v. United States*, 170 Ct.Cl. 241, 249-50 (Cong. Ref. case, 1965) (floods in 1943, 1952, and 1960). But if flooding can be expected, on average, "once every eight years," that is enough. *Stockton v. United States*, 214 Ct.Cl. 506, slip op. at 11 (Ct.Cl. No. 226-74, July 8, 1977); *cf. Barnes v. United States*, 210 Ct.Cl. 467, 474, 538 F.2d 865 (1976) ("one year out of five"). As will become apparent, portions of the Property have been subjected, and will probably continue to be subjected, to extended flooding on an almost yearly basis. However, in order to better understand the flooding to which the Property was subjected, it is necessary to acquire a rudimentary knowledge of the operations of flood control reservoirs.

There are two basic flood regulation schemes. Both depend on monitoring the river flow past a certain point, *e.g.*, Van Buren, Arkansas. The tributaries of the Arkansas River collect rain water from a 138,000-square-mile

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[15]It might here be noted that even a 2-day flood might cause compensable damage to crops and soil. *Cf. Karch v. United States*, Ct.Cl. No. 298-69, finding 15, slip op. at 22 (Trial Div., January 27, 1977). (Findings adopted by App. Div., December 14, 1977.)

watershed. Funneled through Van Buren, all of this water eventually flows past the Property.

Originally, the Arkansas River was to be controlled according to a 150,000 CFS "straight release" plan. When, as a result of a storm, the flow past Van Buren rose to 150,000 CFS, the rise would be stemmed by detaining "excess" waters in the flood control reservoirs. Following the storm, the reservoirs were reemptied by releasing the detained waters (though without letting the total flow exceed 150,000 CFS) so as to maintain a 150,000 CFS flow at Van Buren until pre-storm levels in the reservoirs were regained.

Though not clear from the record, it appears that the 150,000 CFS straight release was abandoned because of a miscalculation of the resulting stage at Van Buren. Unacceptable flooding occurred at Van Buren when waters were released at 150,000 CFS. However, a lower "flowstick" would maintain the reservoirs at a higher fill level and leave downstream riparian property more vulnerable to successive storms. Therefore, a more sophisticated "variable release" plan was adopted. It was published in the Lake Regulation Master Manual (April 1976), though it seems to have been utilized even before publication. The flow regulation level was to be based on the unutilized capacity of the flood control reservoirs and that time of year with a higher flowstick being employed during the rainy season, and when the reservoirs contained more water than usual.[16]

Plaintiff's hydrologist, Mr. R.J. Beuhler, examined the flow gauge records at Van Buren and the flood storage

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[16]The 150,000 CFS yardstick was to be used only when 50 percent of the basins were filled in October and November or 40 percent at other times. A 105,000 CFS yardstick was to be used when about 17 percent of the basin was used in April, May, or June, or 27 percent at other times. A 40,000 CFS yardstick was to be used when about 7 percent of the basin was used in April, May, or June, or 17 percent at other times.

records for the various reservoirs for the period 1970-74. The former showed the actual flows at Van Buren for the regulated river, and the latter showed when, during given flood, the reservoirs started to empty. Mr. Buehler had already made a recession curve study of natural floods and found that natural floods, unregulated floods, fall from 150,000 DFS down to the 40,000 CFS range in about 3½ days. With this information in hand, Mr. Buehler derived discharge profiles for "deregulated" 1970-74 flood events. He then compared the "regulated" and "deregulated" river discharge profiles for the flood events occurring in May 1980, June 1973, October 1973, November-December 1973, March 1974, June 1974, and November 1974. In each case he found that regulation increased the duration of the discharge at Van Buren corresponding to a river surface elevation of 270 ft. at the Property.

Mr. Buehler admitted that his 1970-74 data had shown that the Arkansas was not always regulated according to the "straight release" plan supposedly in effect, though he averred that as to the June 1974 flood event, "it's clear that about [a] 150,000 CFS release was used." Nevertheless, perhaps because Mr. Buehler recognized the uncertainties inherent in the above analysis, he decided to show more clearly the effect of a 150,000 CFS straight release plan by applying it to Van Buren flow gauge records for the unregulated floods of 1935, 1938, and 1943. His comparison of the hypothetical profiles with the observed profiles once again suggested that the duration of flooding at elevation 270 on the Property was increased.

However, defendant argues that the Arkansas River was actually regulated on an *ad hoc* basis:

> Plaintiff has shown that the regulatory plan for the flood control operation of * * * [the Project] was initially designed for releases of 150,000 c.f.s. to pass at 22 feet at the Van Buren gauge. However, the construction of bank stabilization structures upstream from Van Buren

> over-constricted the channel and reduced its carrying capacity. Consequently, when severe flooding occurred in 1973 and 1974, the Corps of Engineers did not release stored flood waters in accordance with the established plan of regulation. Instead, in attempting to relieve the problem at Van Buren, the Corps of Engineers released flood waters on an experimental or ad hoc basis. As a result, in April 1976 the Corps of Engineers temporarily revised the flood control regulation plan from a straight 150,000 c.f.s. to a variable release plan. Finally, in October 1976 the Corps of Engineers initiated a study to determine the manner in which releases will be made in the future.

Defendant concedes that, as a result of the regulation of the Arkansas during the 1973 and 1974 floods, "the duration of flooding was increased at the lower elevations of the Miller property." But defendant maintains that *ad hoc* releases, however damaging, are merely tortious in nature, as they are "random," "temporary," and "contrary to the regulatory plan."

It seems likely that the Arkansas River, for the immediate future, will be regulated according to the variable release plan outlined by the Lake Regulation Master Manual (April 1976). Defendant has used a computer model to construct two *hypothetical* elevation hydrographs. Both predict the behavior of the Arkansas River in the vicinity of the Miller tract during 1940-74, but one assumes that the Arkansas remained in its natural state, and the other assumes that the river was regulated according to the Lake Regulation Master Manual guidelines during the entire 35-year period.[1] A comparison of these hydrographs

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[1] The period 1940-74 saw the gradual alteration of the Arkansas River from its natural state into its present form. Defendant's first hydrograph was constructed by mathematically "deregulating" the river, i.e., "adding back" the stored water and "routing" it to Van Buren. Then defendant's second hydrograph was constructed by applying the Lake Regulation Master Manual plan to the hypothetical "natural" river. Needless to say, these calculations are based on a number of assumptions; still, they give a feel for the effects of a variable release plan, and are therefore felt to be helpful.

lends credence to plaintiff's position that such regulation will inevitably subject portions of the Property lying above 268 ft. to an increased duration of flooding.[18]

It is, of course, true that other, higher-lying portions of the Property would have been benefited by the Project, and that this court will eventually have to weigh benefits against detriments in order to determine "just" compensation. But for the threshhold issue of liability presently before the court, it is enough to find that the Project will inevitably increase the duration of flooding on certain portions of the Property not subject to the flowage easements possessed by the Government, and that this increase constitutes a "taking" for which "just" compensation must be accorded.

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[18]

Flood Event	Elevation at which Duration of Flooding was (or would have been) Increased as a Result of Regulation
November 1941	Below 275
April-May 1942	274
May-June 1943	277
April 1944	273
April-May 1945	276
October 1945	273
May-June 1949	275
May 1950	272
July 1951	274
May-July 1957	275
October-November 1959	275
May-June 1961	275
April-May 1970	273
March-June 1973	276
November-December 1973	275
March 1974	275
June 1974	275
November-December 1974	275

The easement taken by defendant will give defendant the privilege of occasionally inundating the lands lying between 268 and 275 ft. by the release of impounded waters from the flood control reservoirs of the Project.'[19]

Plaintiff's Second Taking Theory: Underflowage Easement

Plaintiff's second allegation is that the Project caused certain areas of the Property to be damaged "by the raising of the water table to a level so close to the surface of those areas as to interfere with the use thereof."

It is settled law that a "taking" may result when the water table is raised by governmental action. *United States v. Kansas City Ins. Co.*, 339 U.S. 799, 809-10 (1950); *Barnes v. United States*, 210 Ct.Cl. 467, 473-74, 475, 538 F.2d 865 (1976); *Tri-State Materials Corp. v. United States*, 213 Ct.Cl. 1, 550 F.2d 1, 2 (1977). Among the adverse effects of higher ground water which, if sufficiently permanent in nature, give rise to a "taking" are:

> [D]estruction of the land for pasture purposes, extensive cattail growth, killing of trees, rotting of crops, failure of seeds to germinate, and inability to use farm machinery on the land. [*Barnes, supra*, at 473-74.]

In 1959-64 the United States Geological Service (hereinafter "USGS"), at the request of the Corps, prepared two maps, one representing the actual ground water

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[19]If a revision in the flood control strategy is imminent, it may be necessary to ask defendant to account for the value of this easement from the time of the taking until the time of the revision, and for the value of the easement subsequent to the revision. And these values would reflect the differing vulnerability of the Property to flooding attributable to the old and new plans.

Although the time of taking, from n. 18, *supra*, appears to be April 1970, a decision on this point is not necessary at this time and, accordingly, is deferred to the accounting stage.

surface at the Property at the time of the study, and the other representing the projected, post-Project, water table. The projection was based on the following three assumptions: (1) the Project was completely constructed; (2) the Toad Suck Ferry Lock and Dam No. 8 had been closed; and (3) the associated navigation pool was being regulated at 265 ft.

Mr. Gilbert J. Stramel testified that a 4-ft. rise in the water table at the Property had been projected by the USGS, but that, in his opinion, the ground water table had actually risen *6 ft.*

It is well known that a shallow water table can damage crops. According to defendant, this occurs when the water table is ½ ft. below the surface. Plaintiff contends that even a 3-ft. table can have an adverse effect.

Defendant relied heavily on a Department of Agriculture (hereinafter "DOA") study. However, the projectional phase of this study considered only a single form of crop damage (oxygen starvation), and ignored the capillary action of clay soils.[20] The record leaves open the question of whether a 3-ft water table at the Property would cause the rotting of crops planted on clay soils.

On the basis of the DOA study of the effect of the Project on crops planted in the McLean Bottoms, the Government adopted a 3-ft. taking criterion. Plaintiff argues that since defendant heavily relied on other DOA observations at McLean as evidence of what the Arkansas River might have done to the Property, the 3-ft. taking criterion should be adopted in this case. In addition, plaintiff relies on a quotation from a USGS/Corps of Engineers' publication which, in discussing dam site evaluation, said

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[20]Capillary action causes a moistening of soil (the "capillary fringe") lying above the water table. The capillary fringe is more extensive in clay-type soils. The clay fields of the Property are located essentially at elevations 273 and below.

that "it was assumed that land utilization would be affected where the depth to ground water was *five feet or less.*" (Emphasis added.) The relevancy of these prior criteria is a matter of dispute.

Mr. Hal Walker, the son of the tenant farmer on the Property, testified that since the closing of the Toad Suck Ferry Lock and Dam No. 8 in 1969, he had been able to get only a single crop out of the 300 acres near the ox bow lake. He had, of course, planted more than one crop, but in some years it had been too wet to plant a crop there at all. Both surface water and ground water interfered with the planting of the crop. And on other occasions, they interfered with the harvesting of the beans he had managed to plant, and he lost the crop because of rotting.

Mr. Walker further testified that before the Dam, he farmed alfalfa on the Property, but that he no longer attempts it. "[T]he water will get up and kill it." The alfalfa field was on "some of the highest land" of the Property.

Even if no crop damage has occurred, it is apparent that the use of farm machinery on the clay fields has been hindered by the Project. According to Mr. Walker, after the closing of the Toad Suck Ferry Lock and Dam No. 8 it became impossible to tractor farm the shore of the ox bow lake. This crescent of "blackland" was wet "all the time." He testified that if he were to try to drive a tractor across the wet areas, he would not have been able to get out. The tractor would "just bog down." These wet areas were areas which had been tractor farmed prior to the Project.

On cross-examination, Mr. Walker indicated that he "constantly" had problems with machinery when farming the blacklands, and that these problems were not confined to a narrow strip ("20 ft." was suggested by counsel for defendant), but was in fact as wide as 500 ft. in certain places.

Mr. Henson, defendant's expert, argued that sogginess could make it impossible to run heavy machinery over the farmland, but felt that the problem disappeared when the water table was 1 ft. or more deep. Mr. Henson, however, is not a farmer by trade, whereas Mr. Walker had, at the time of his testimony, helped his father farm the land for some 13 years. It is further noted that Mr. Henson's testimony was based on the McLean Bottoms study. Mr. Henson, moreover, admitted that while soybeans did grow in the soggy McLean soil referred to, "they never could combine them."

To the extent that the raising of the water table by the Project has hindered the tractor farming of the Property, a "taking" has occurred, and the plaintiff is entitled to just compensation therefor. *Barnes v. United States, supra.*

The various USGS' and Corps of Engineers' peizometric studies, as expressed in the form of contour maps and cross-sectional profiles, are the most persuasive evidence on the ground water effect of the Project, and they clearly show that the Project has caused the water level beneath the Property to rise to a height of 270ft., 2 ft. above the upper bound of defendant's existing flowage easement.

It is, accordingly, concluded that the defendant has taken an underflowage easement, permitting it to raise the water table to 270 ft.[21] Since the testimony of record does not show which acres of the Property are affected—either in terms of direct crop damage or in terms of "non-combinability"—plaintiff will have to present appropriate proofs during the accounting phase.

In sum, it is concluded that the operation of the Project by defendant has resulted in increased frequency or duration of flooding on, and a raised water table under, portions of the Property not servient to defendant's flowage easement, and plaintiff therefore is entitled to compensation.

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[21]The highest altitude reached by the water table in 1976 was 271 ft.

IN THE UNITED STATES COURT OF CLAIMS

No. 66-75

CHARLES M. MILLER

V.

THE UNITED STATES

H. Clay Robinson, for plaintiff. *W. Dent Gitchel*, attorney of record. *Cearley, Gitchel, Bogard & Mitchell, Gordon & Gordon*, and *Pryor, Robinson, Taylor and Barry*, of counsel.

John E. Lindskold, with whom was *Acting Assistant Attorney General Sanford Sagalkin*, for defendant.

Before FRIEDMAN, *Chief Judge;* COWEN, *Senior Judge;* DAVIS, KASHIWA, KUNZIG, BENNETT and SMITH, *Judges, en banc.*

ORDER

After hearing oral argument *en banc* in this difficult and complicated case, and after again considering the briefs of the parties and the supplemental statements furnished by them, the court finds, with regret, that it is necessary to remand this case to the trial judge to make additional findings of fact and/or conclusions of law.

The trial judge's decision is vacated, because we believe it rests in part upon erroneous conclusions of law. The trial judge concluded that when the former channel of

the Arkansas River filled in and became non-navigable after the Government constructed the cutoff, the Government's navigation servitude over the non-navigable channel was lost. He held that the continued existence of the servitude depended upon "whether the Arkansas remains an artery of interstate commerce." This conclusion appears to be contrary to the decision of the Supreme Court in *Oklahoma v. Atkinson Co.*, 313 U.S. 508, 523 (1941). *See also, United States v. Commodore Park, Inc.*, 324 U.S. 386, 393 (1945) and *Allen Gun Club v. United States*, 180 Ct.Cl. 423, 429 (1967).

The court does not agree that when the Government purchased the 248.26 acres from plaintiff in 1950, the purchase price was reduced by the value of the benefit accruing to the plaintiff in the form of emerged land which plaintiff now says is worth $1,690,000. Contrary to the trial judge's holding, it is also the view of the court that there is no irrebuttable presumption that in the 1970 condemnation, the amount paid was reduced by the extent of any benefit accruing to plaintiff through the construction of the cutoff.

In addition, the court finds that the following are crucial issues of fact (or mixed questions of law and fact) which have not been found by the trial judge or are not readily ascertainable from undisputed evidence of record:

1. Although it is well settled that the Government's navigation servitude extends to all submerged property within the bed of a navigable river from ordinary high-water mark on one side to ordinary high-water mark on the other, there is a factual dispute as to how much of the land in controversy was located above the ordinary high-water mark of the river prior to the construction of the 1950 cutoff. How much of that land is located within the area of the former bed of the river and how much outside the former bed?

2. It is undisputed that at least part of the land in issue emerged from the bed of the river after the cutoff, but

there is a dispute as to whether the surfaced lands, which are the subject of plaintiff's claim, are necessary to the continued operation of defendant's "navigational project or its purpose." *See Bonelli Land and Cattle Co. v. Arizona*, 414 U.S. 313, 329 (1973).

3. Another question, the answer to which is essential to the disposition of this case, is whether the lands in issue here "were probably within the scope of the project from the time the Government was committed to it." *United States v. Miller*, 317 U.S. 369, 377 (1943); *United States v. Reynolds*, 397 U.S. 14, 21 (1970), and *United States v. 62.17 Acres of Land, etc., in Jasper County*, 538 F.2d 670 (5th Cir. 1976). In this connection the trial judge should determine whether or not, at the time of the 1950 cutoff, the Government was committed to the project which later caused the flooding of plaintiff's lands for which compensation is now sought.

4. Have the benefits which plaintiff has received as a result of the Government's activities been greater than the damage he has sustained? *United States v. Sponenbarger*, 308 U.S. 256, 266-67 (1939); *United States v. Miller*, 317 U.S. 369 (1943); *John B. Hardwicke Co. v. United States*, 199 Ct.Cl. 388, 467 F.2d 488 (1972). Defendant claims that plaintiff is suing for the taking of land that emerged from the bed of the river as a result of Government activities. Also, the defendant asserts, but plaintiff does not agree, that the completion of the project authorized by the Act of 1946 and the operation of the dam has decreased the duration, frequency and elevation of floods on lands in the vicinity of plaintiff's property as compared with the floods which occurred on the 1834 acres of plaintiff's land prior to the beginning of the project.

IT IS THEREFORE ORDERED that the case is remanded to the trial judge with instructions to make findings of fact on each of the issues listed above, and where

there are mixed questions of law and fact, to state his conclusions of law thereon. The trial judge may rely on evidence that is already of record, but he should also permit either party to offer any additional non-cumulative evidence which is relevant and material.

In connection with the 1969-70 condemnation (finding 20), the trial judge is instructed to make findings of fact stating whether or not: (a) prior to the condemnation action, plaintiff made a written offer to sell the easement to the defendant and the offer was accepted by defendant; (b) defendant advised plaintiff that it was necessary to file a *friendly* condemnation suit to clear title to the easement; (c) the district court's judgment was based upon and incorporated the offer and acceptance (option contract), and (d) the option contract, any other agreement of the parties, or the judgment of the district court contained a provision that the $400 paid by the defendant for the easement took into consideration "by way of reducing the amount of compensation or damages any special or direct benefits" accruing to plaintiff as a result of defendant's navigation project, and if so, to what extent was the compensation paid plaintiff reduced by the value of said benefits?

BY THE COURT

/s/ Daniel M. Friedman
DANIEL M. FRIEDMAN
Chief Judge

IN THE UNITED STATES COURT OF CLAIMS

No. 66-75

CHARLES M. MILLER

v.

THE UNITED STATES

H. Clay Robinson, for plaintiff. *W. Dent Gitchel*, attorney of record. *Cearley, Gitchel, Bogard & Mitchell, Gordon & Gordon*, and *Pryor, Robinson, Taylor and Barry*, of counsel.

John E. Lindskold, with whom was *Acting Assistant Attorney General Sanford Sagalkin*, for defendant.

Before FRIEDMAN, *Chief Judge*; COWEN, *Senior Judge*; DAVIS, KASHIWA, KUNZIG, BENNETT and SMITH, *Judges, en banc*.

ORDER

This case comes before the court on plaintiff's motion of December 10, 1979 for clarification of the court's order entered November 21, 1979. Plaintiff inquires if there is still open for further proof, the issue as to whether the benefits accruing to plaintiff in the form of emerged land were taken into account in determining the compensation for the 1950 taking. In order to avoid further delay in the proceedings before the trial judge, the court hereby declares that in its order of November 21, 1979, this issue was resolved against the plaintiff.

BY THE COURT.

/s/ Daniel M. Friedman
DANIEL M. FRIEDMAN
Chief Judge

Feb. 8, 1980

UNITED STATES CLAIMS COURT

No. 66-75

CHARLES M. MILLER

v. JUDGMENT

THE UNITED STATES

Pursuant to the opinion of October 19, 1982, it was held that plaintiff is not entitled to compensation with the complaint to be dismissed.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Frank T. Peartree

Clerk of Court

By: /s/ Linda A. Eddins

Deputy Clerk

Oct. 20, 1982

NOTE: As to appeal, *60 days* from this date, see FRAP 4(a)

IN THE UNITED STATES CLAIMS COURT

No. 66-75

(Filed October 19, 1982)

CHARLES M. MILLER	Inverse condemnation; retention of navigational servitude so long as required for project.
v.	
THE UNITED STATES	

H. Clay Robinson, attorney of record, for plaintiff. *Pryor, Robinson, Taylor & Barry*, of counsel.

John E. Lindskold, with whom was *Assistant Attorney General Carol E. Dinkins*, for defendant.

OPINION

COLAIANNI, *Judge:* Plaintiff in this case has alleged a "taking" by the Government of a flowage and underflowage easement on farm property riparian to the Arkansas River in Perry County, Arkansas. Plaintiff's complaint is that his land suffers increased flooding and duration of flooding as a result of the operation of the McClellan-Kerr Arkansas River Navigation System. He further maintains that the project has raised the ground water table under his land and that he is consequently unable to machine farm parts of the land.

A trial was held on the issue of liability and I concluded that defendant's actions resulted in a compensable "taking" under the fifth amendment. On June 14, 1978, a recommended decision and findings of fact were submitted to the court to that effect. In response to exceptions by defendant, the court, by order of November 21, 1979, remanded the case back to the trial division for additional findings of fact on specific questions which the court deemed necessary for a determination of the case.

Following the remand and pursuant to order, a pretrial conference was held to determine if a trial would be necessary

to answer the court's questions. As a result of the conference, the parties stipulated responses to questions 1-4 of the November 21st order. These stipulations were contained in a "Memorandum Re Pretrial Conference," dated April 7, 1981. Thereafter, in a further effort to respond to additional questions, the parties stipulated answers to the court's questions (a), (b) and (c). The stipulation regarding the latter questions was accepted on August 19, 1981, in open court.

One question of fact remained to which the parties were unable to stipulate an answer. Thus, on August 19, 1981, a trial was held in Little Rock, Arkansas, to hear testimony and receive exhibits on this final issue.

When this case was remanded, it was deemed to have been remanded for a resolution of only those specific factual questions detailed in the court's order of November 21, 1979. Accordingly, no additional recommended opinion was to have been proposed to the court by the trial judge. However, with the implementation of the Federal Courts Improvement Act of 1982 and the resulting dissolution of the Court of Claims and the creation of the new Claims Court, this has changed.

As of October 1, 1982, the trial division of the Court of Claims became the United States Claims Court. With this change, the new Claims Court judges were charged with the responsibility of reaching final decisions in cases brought before the court. The former Court of Claims judges have become appellate judges of the new Court of Appeals for the Federal Circuit, and their duties include hearing appeals from final judgments rendered by the Claims Court. Because of these changes, it is incumbent upon me to do more than simply refer the findings of fact and conclusions of law to the new appellate court in answer to the particular questions included in the remand order from the former Court of Claims judges; I must now reach a decision as to the issues not already resolved and render a final judgment in this case.

Therefore, based on a review of the entire record, including the conclusions of law contained in the remand order, the stipulations of the parties, and the additional evidence received at trial, I have concluded that there has been no taking in this case, and that plaintiff is thus not entitled to compensation for the flooding of his property.

Background

A portion of the facts contained in the June 14, 1978, opinion, useful to the understanding of the decision on remand, are set forth here again as background.

Plaintiff, in 1936, became the owner of a 1,834-acre tract of land in Perry County, Arkansas. This tract (hereinafter, the "property") was at one time located within a northward loop of the Arkansas River. The Arkansas River was highly unstable in its natural state. Because of its heavy sediment load, it presented serious impediments to navigation. The river could overnight change from a mere trickle of water to a rushing torrent, change its course, and destroy improvements along its banks.

During the late forties, erosion transformed plaintiff's property into a peninsula delimited by a "horseshoe" bend of the Arkansas, and reduced his acreage to between one-third and one-half of its original size. The Corps of Engineers (hereinafter the "Corps") became concerned, as they expected that the river would soon cut itself a new channel across the neck of the peninsula. Such a natural "avulsive change" would have been a serious setback to river navigation, as the new channel would probably contain sharp, difficult-to-navigate bends. The United States therefore acquired 248 acres from plaintiff for $34,000 and planned the construction on this acreage of a new, easily navigable channel for the river (hereinafter the "Morrilton Cutoff" or "Cutoff").

In May 1950 the Corps constructed a pilot channel across the neck of the ox bow. The abrasive action of the river soon widened the channel to the desired extent, and its northern bank was stabilized by the Corps in 1952 by the construction of a suitable revetment. The new channel captured most of the flows of the Arkansas. As a result of water flowing through the old channel at lesser velocities, sediment was deposited. The silting-up of the ox bow was accelerated by the Corps' construction of two dikes at the upstream end of the old channel in 1952 to divert flows away from the old riverbed. The old channel became an ox bow lake, a nonnavigable tributary of the Arkansas. Eventually the plaintiff sought and obtained title to the emerged lands, and began to farm them. Of the 1,719 acres currently comprising the Miller farm or property, approximately 800 acres lie on the pre-cutoff bed of the Arkansas River.

In 1956 the Corps began the construction of the McClellan-Kerr Arkansas River Navigation Project, authorized by Congress back in 1946.[1] Seven tributary lakes were to be converted into multiple-purpose reservoirs for low-flow regulation, sediment control, flood control, domestic and industrial water supply, and hydroelectric power. In addition, the main stem of the river was to be "canalized" by 17 navigation locks and dams. (When completed, the project was to provide a 448-mile long navigational channel from around Tulsa, Oklahoma, to the Mississippi River.) By 1964 the last of the upstream flood control reservoirs had been readied for flood control operation, the primary object of the authorizing legislation. The canalization plan was changed many times as the Corps found ways of simplifying the system. In 1960 or shortly thereafter, it was decided that the Toad Suck Ferry Lock and Dam No. 8 would be located 9½ miles downstream from plaintiff's property, and that the elevation of its upstream navigation pool would be fixed at 265 ft. The property is

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[1]Rivers and Harbors Act of July 24, 1946, 60 Stat. 641.

riparian to this pool. In 1965 wing dikes were constructed downstream of the property, and in 1969 the downstream Dam No. 8 was closed.

Plaintiff alleged in his complaint that the closing of the dam resulted in greater flooding to his land and that the operation of flood control reservoirs caused increased duration of flooding on the property. He also complained that he is unable to farm his crops with heavy machinery because the project has raised the water table under the farm. I originally found that there was a substantial interference with plaintiff's use of his land as a result of the project and that the portions of the property so affected were not servient to any flowage easement defendant had over plaintiff's land. I therefore concluded that there was a "taking" and that plaintiff was entitled to compensation, but since—

> [T]he testimony of record does not show which acres of the property are affected—either in terms of direct crop damage or in terms of "noncombinability"—plaintiff will have to present appropriate proofs during the accounting phase.[2]

Although defendant maintained that the Government held a navigation servitude over the property within the former bed of the Arkansas, it was never made entirely clear that all the "land in controversy" was part of this riverbed. Defendant's rationale is further grounded in the common law doctrines of "avulsion" and "accretion." Accretion is the process by which deposits of soil are gradually added to one's land by the operation of natural causes. Avulsion is the sudden addition or loss to land due to a radical change in the course of a river or stream.

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[2]Miller v. United States, Ct.Cl. Trial Div., No. 66-75, Opinion of June 14, 1978, at 31.

In the former instance, common law recognizes that property lines measured by the water will change gradually with the migration of the river or stream. However, with avulsion, the law acknowledges the drastic impact of the boundary change to the landowner and does not in that case shift property title with the shift in the water's course. Thus, the avulsion doctrine mitigates the hardship that the sudden movement of a river or stream would have on the abutting landowner. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 327 (1973).

Defendant maintained that the creation of the cutoff was an artificial avulsion and that the property interest held by the Government, that is, the navigation servitude, did not shift with the river. The court on remand allowed that the former riverbed might still be subject to a servitude even though it was no longer a navigable waterway, but focused on the *Bonelli* requirement that there must exist a navigation purpose to retain an interest in the exposed land.

Defendant also insisted that benefits to plaintiff's property had to be taken into account in deciding if there had been a taking. Plaintiff claimed that benefits from the project had already been considered either in the bargaining that occurred in the negotiation of the 1950 sale of land to defendant or as an element of compensation for acreage condemned in 1969-70. It was determined in the recommended opinion that there was a presumption that these benefits were considered in the context of the negotiated sale in 1950, and that this presumption had not been rebutted. Further, it was determined that there was an irrebuttable presumption that benefits were considered in the 1970 condemnation proceedings, based on the directives or 33 U.S.C. §595 (1970). This section of the code required that the Government "take into consideration by way of reducing the amount of compensation or damages any special or direct benefits to the remainder" arising from Government projects.

The conclusion was that benefits from the 1950 Morrilton Cutoff could not be weighed again in determining plaintiff's recovery from lands taken. The court on remand disagreed with the conclusion that the consideration of benefits was decided by presumption, and directed that further factfinding be done on this issue.

Discussion

The decision I come to in this case incorporates the legal conclusions articulated by the court in its remand order. Thus, the Government did not necessarily lose its navigation servitude over surfaced lands within the boundaries of the former bed of the Arkansas River, up to its mean high water level, when the channel became nonnavigable. Whether the Government continues to hold the navigation servitude depends on whether the emerged lands are needed for the continued operation of the navigation project which caused the resurfacing of the land. This conclusion is in keeping with the decision reached in *Bonelli Cattle Co. v. Arizona, supra,* at 329.

The facts of the *Bonelli* case are similar to those in the instant case. Plaintiff Bonelli acquired title to a parcel of land abutting the east boundary of the Colorado River. The land was originally granted by patent to the Santa Fe Pacific Railroad Company in 1910. In 1912, upon admission to the Union, Arizona succeeded the Federal Government to title of the Colorado River bed. Over the years, the river moved eastward, resulting in the submergence of plaintiff's land. In 1959, the Federal Government rechannelled the river, causing the water of the river to withdraw from much of plaintiff's land.

Plaintiff brought suit to quiet title to the emerged land, but the State of Arizona maintained that the title to the former riverbed remained with it. The Supreme Court disagreed. It held that since there was no longer any public need for the land, the state's title was defeasible, since

public need for the land was the basis for vesting title with the state in the first place. The court found that where—

> [L]and cast up in the Federal Government's exercise of the servitude is not related to furthering the navigational or related public interests, the accretion doctrine should provide a disposition of the land as between the riparian owner and the state.

Id. at 329.

Similarly, the court held, riparian lands may suffer noncompensable losses in the exercise of the Government's navigational servitude. *Id.*

Thus, the facts in the instant case must be reviewed in the context of the *Bonelli* holding. Question 2 of the remand order focused on this point. The court asked:

> 2. It is undisputed that at least part of the land in issue emerged from the bed of the river after the cutoff, but there is a dispute as to whether the surfaced lands, which are the subject of plaintiff's claim, are necessary to the continued operation of defendant's "navigational project or its purpose." *See Bonelli Land and Cattle Co. v. Arizona*, 414 U.S. 313, 329 (1973).

The parties stipulated the following response: "It is necessary to flood the 'lands in controversy' to permit navigation on the Arkansas River."

Thus, the plaintiff conceded that the flooding of the former riverbed portion of his land is necessary for the navigation project. In view of the parties' stipulated response, the next question which must be addressed is whether any of the "lands in controversy" are subject to a navigation servitude. This issue is treated by question 1 of the order:

> 1. Although it is well settled that the Government's navigation servitude extends to all submerged property within the bed of a navigable river from ordinary high-water mark on one side to ordinary high-water mark on the other, there is a factual dispute as to how much of the land in controversy was located above the ordinary high-water mark of the river prior to the construction of the 1950 cutoff. How much of that land is located within the area of the former bed of the river and how much outside the former bed?

The stipulated answer to this question was as follows:

> Plaintiff will accept the Government's survey that *all* "lands in controversy" are situated within the area of the former riverbed as it existed prior to the construction of the 1950 cutoff for purposes of determining whether a taking occurred.

Looking at these stipulated responses in light of the *Bonelli* case, I find that they are dispositive of this case. Since all of the land in controversy is within the former riverbed, and the flooding of the land is necessary to the navigation project which caused the emergence of the land initially, then the Government has a navigational servitude over all of the land in controversy. Therefore, there has been no taking under the fifth amendment.

Having concluded that there has been no taking, it becomes unnecessary to consider the additional questions posed by the court on remand.[3]

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[3]These questions, which except for question (d), are the subject of the parties' stipulations, go to the issue of whether benefits to plaintiff's land were considered in connection with compensation paid to plaintiff for an easement in 1968. The discussion of benefits would only be relevant if part of the land interfered with by the Government were outside the former riverbed for it would then become necessary to determine compensation for the taking. In such a case, the Government would be entitled to offset benefits to the land resulting from its project against any detriment to the property to see if a taking has occurred. *See United States v. Sponenbarger*, 308 U.S. 256 (1939).

CONCLUSION

Based on the foregoing, the court concludes as a matter of law that plaintiff is not entitled to compensation for the flooding of his property, within the former riverbed of the Arkansas River, which is necessary to the continued operation of defendant's navigation project, and the petition is dismissed.